



# Arizona State Senate Issue Brief

November 3, 2022

## Note to Reader:

The Senate Research Staff provides nonpartisan, objective legislative research, policy analysis and related assistance to the members of the Arizona State Senate. The *Research Briefs* series is intended to introduce a reader to various legislatively related issues and provide useful resources to assist the reader in learning more on a given topic. Because of frequent legislative and executive activity, topics may undergo frequent changes. Nothing in the Brief should be used to draw conclusions on the legality of an issue.

## ARIZONA ADMINISTRATIVE PROCEDURE ACT: AGENCY RULEMAKING

### INTRODUCTION

The primary purpose of rulemaking is to provide public notice of the substantive or procedural requirements that an agency has for activities falling within its statutory authority. The Arizona Administrative Procedure Act (APA) provides procedures for agency rulemaking and for appealing agency decisions. For purposes of this brief, the term *agency* is used to refer to a state agency, board or commission.

An agency may make rules only if the Legislature has given it the authority to do so, unless exempt from rulemaking procedures. A rule is valid only if it is made in substantial compliance with the APA or other statutory procedures applicable to the agency which are designed to ensure adequate public participation in the rulemaking process. Each agency and the Secretary of State (SOS) must prominently post on their websites notice of an individual's right to petition the agency and the Governor's Regulatory Review Council (GRRC) for review of an agency practice, substantive policy statement or final rule.<sup>1</sup>

### GOVERNOR'S APPROVAL OF RULEMAKING

Beginning in 2022, an agency is prohibited from conducting regular, expedited, informal, formal, emergency or exempt rulemaking without prior written approval from the Governor. In seeking approval, an agency must submit a justification that the rulemaking meets at least 1 of 10 outlined criteria and a recommendation for three rules to remove for every proposed new rule. The agency must submit the proposed rule for Governor-approval before submitting the rule to GRRC for review.<sup>2</sup>

<sup>1</sup> [A.R.S. § 41-1033](#)

<sup>2</sup> [Laws 2022, Chapter 265](#); [A.R.S. § 41-1039](#)

## **RULEMAKING PROCESS**

The APA requires most agencies, by December 1 of each year, to prepare and make publicly available the regulatory agenda for the agency during the next calendar year. Any agency that intends to make, amend, renumber or repeal a rule must inform the public by publishing a Notice of Rulemaking Docket Opening in the Arizona Administrative Register (Register), published monthly by the SOS.<sup>3</sup>

The rulemaking docket includes the subject of the proposed rule, agency contact information, where copies of pertinent information may be inspected, the status of the proposed rule, any known timetable for agency decisions or actions on the rule and specified dates regarding the rule.<sup>4</sup>

Once the rule is drafted and the agency is ready to start the process of making the rule law, a Notice of Proposed Rulemaking is filed with the SOS. This notice includes the preamble, an economic impact statement, why the rule is necessary and the exact wording of the rule.

The rulemaking docket must remain open while the rulemaking proceeding is pending. A rulemaking proceeding is pending from the time the agency considers proposing the rule until one of the following occurs: 1) the agency decides to no longer pursue the rule; 2) no action is taken one year after the Notice of Proposed Rulemaking is published; 3) the rule becomes effective; or 4) a notice of termination is published. After providing notice of a docket opening, the agency may meet informally with any interested party to discuss the proposed rulemaking action and may post public notice of these meetings in the Register.<sup>5</sup>

At the same time as filing the Notice of Proposed Rulemaking, the agency must notify any person who requested to be advised of the proposed rulemaking. The agency must allow at least a 30-day public comment period after publishing the proposed rule. If the agency receives a written request to

conduct a public hearing on the proposed rule, the agency must provide a 30-day notice of the scheduled proceeding.<sup>6</sup>

If the agency determines that a proposed rule requires substantial change, resulting from public comment or holding a public hearing, the agency issues a Notice of Supplemental Proposed Rulemaking for publication in the Register.

Once the comment period is over, the rulemaking record is closed. The agency has 120 days from the close of the record to either terminate the proceeding or to submit the rule to GRRC or the Attorney General (AG) for approval. However, if the rule is statutorily exempt from rulemaking the final rule is filed with the SOS.<sup>7</sup>

## **GOVERNOR'S REGULATORY REVIEW COUNCIL**

GRRC was established by Executive Order in May 1981 and is the final step in the rulemaking process for most agencies. GRRC consists of six Governor-appointed members who serve staggered, three-year terms. The Director or Assistant Director of the Arizona Department of Administration (ADOA) administers GRRC and serves as an ex officio member and the chairperson. GRRC is required to meet at least once a month. Members are eligible to receive \$200 for each day in which GRRC meets and reimbursement for expenses.

GRRC is responsible for reviewing each agency's rules to ensure that they are necessary and to avoid duplication and adverse impact on the public. GRRC assesses whether: 1) a rule is clear, concise, understandable, legal, consistent with legislative intent, consistent with the agency's statutory authority; and 2) whether the benefits of a rule outweigh the cost. If a rule does not meet these criteria, GRRC returns it to the agency for further consideration. GRRC must review the rule package and approve or return it, in whole or in part, within 90 days of receipt.

<sup>3</sup> [A.R.S. § 41-1021.02](#)

<sup>4</sup> [A.R.S. § 41-1021](#)

<sup>5</sup> [A.R.S. § 41-1021](#)

<sup>6</sup> A.R.S. §§ [41-1022](#) and [41-1023](#)

<sup>7</sup> A.R.S. §§ [41-1005](#) and [41-1024](#)

Once GRRC or the AG approve a rule, the rule package is filed with the SOS who affixes the time and date of filing to each document, indicating the rule is final. The rule becomes effective 60 days after filing with the SOS, except for expedited rulemaking which takes effect 30 days after filing. All final rules are published in the Register and the Arizona Administrative Code, which contain the full text of each final rule, including rules made by statutory exemption.<sup>8</sup>

### **EXPEDITED RULEMAKING**

An agency is allowed to conduct expedited rulemaking if the rulemaking does not increase the cost of regulatory compliance, increase a fee or reduce procedural rights of regulated persons and does at least one of the following: 1) amends or repeals rules made obsolete by repeal or supersession of an agency's authority; 2) amends or repeals rules for which the authorizing statute has been declared unconstitutional; 3) corrects typographical errors, makes address or name changes or clarifies rule language without changing its effect; 4) adopts or incorporates, without material change, federal statutes or regulations or Arizona Statutes or rules by reference; 5) reduces or consolidates steps, procedures or processes; 6) amends or repeals outdated, redundant or otherwise unnecessary rules; 7) implements an action proposed in a five-year review report without material change made within 180 days of filing proposed expedited rulemaking with the SOS; or 8) adopts, without material change, rules of another agency that has been or will be consolidated into the agency.<sup>8</sup>

Prior to submitting an expedited rulemaking notice with the SOS for publication in the next Register, an agency must notify the President of the Senate, the Speaker of the House of Representatives, the Governor, GRRC and the Administrative Rules Oversight Committee of the expedited rulemaking. The agency and GRRC must post a notice of the proposed expedited rulemaking on their websites.

<sup>8</sup> [A.R.S. § 41-1051](#)

<sup>9</sup> [A.R.S. § 41-1027](#)

### **EXEMPT RULEMAKING**

An agency with a one-time rulemaking exemption from the Legislature must review the rule adopted under the exemption within one year to determine if the rule should be amended or repealed. The agency must prepare a written report and receive approval from GRRC for the proposed action.<sup>10</sup>

Statute exempts some agencies from the GRRC approval process and instead requires submittal of the rule package to the AG. These agencies include the Arizona Corporation Commission and any agency headed by a single elected official. However, exempt agencies may follow GRRC's rulemaking requirements instead of submitting the rule package to the AG. The AG must approve or disapprove the rule within 60 days of receipt. For AG approval, the rule must be clear, in proper form, within the power of the agency and in compliance with appropriate procedures.<sup>11</sup>

### **FIVE-YEAR REVIEW REPORT**

Agencies must review their rules at least once every five years to determine if the rules need to be amended or repealed. Statute requires an agency to consider specific factors, including effectiveness and whether the rule is authorized by existing statute. The report must also include written criticisms received by the agency. Any person who is regulated or who may be required to obtain a license may petition GRRC to require an agency to consider additional recommendations in the five-year report.

GRRC maintains a five-year calendar of when each agency must review its rules and submit its report summarizing its findings. GRRC may review rules outside of the five-year review process if requested by at least four GRRC members. Upon review, GRRC must approve or return the agency's report, in whole or in part. If an agency fails to submit a five-year report, the rules scheduled for review expire and are no longer enforceable. To reestablish the rules, the agency must go through the rulemaking process.<sup>12</sup>

<sup>10</sup> [A.R.S. § 41-1095](#)

<sup>11</sup> [A.R.S. § 41-1044](#)

## ***SUBSTANTIVE POLICY STATEMENTS***

An agency must annually publish a directory summarizing all rules and substantive policy statements and make the directory available to the public at the office of the agency director.<sup>13</sup> Substantive policy statements must also be filed with the SOS to be published in the Register.<sup>14</sup>

Additionally, each agency must post the full text of, or a web address for, each rule or substantive policy statement currently in use on the agency's website.<sup>15</sup>

A substantive policy statement is a written expression that informs the general public of an agency's current approach to, or opinion of, the requirements of laws and court orders, including the agency's current practice, procedure or method of action based upon that approach or opinion. The statement is advisory only and does not include internal procedures.

## ***ADDITIONAL PETITION OF AGENCY ACTIONS***

A person may petition GRRC to review an existing agency practice, substantive policy statement, final rule or regulatory licensing requirement that the petitioner alleges is not specifically authorized by law, exceeds the agency's statutory authority, is unduly burdensome or is not demonstrated to be necessary to fulfill a public health, safety, or welfare concern.

If requested by at least three members, GRRC must review the petition at a public hearing within 90 days. At the hearing, GRRC must allocate equal time to the petitioner and agency for oral comments and may allocate time for members of the public.

A rule, practice, policy statement or licensing requirement is void if GRRC determines that: 1) the agency practice, substantive policy statement or regulatory licensing requirement exceeds the

agency's statutory authority, is not statutorily authorized or constitutes a rule; or 2) the final rule does not meet statutory requirements. If GRRC determines that an agency practice, substantive policy statement, final rule or regulatory licensing requirement is unduly burdensome or not demonstrated necessary to fulfill a public health, safety or welfare concern, GRRC may modify, revise or declare void the practice, policy statement, rule or regulatory licensing requirement.<sup>16</sup>

## ***ADDITIONAL RESOURCES***

- Arizona Secretary of State  
1700 W. Washington, 7<sup>th</sup> Floor  
Phoenix, AZ 85007  
[www.azsos.gov](http://www.azsos.gov)
- Arizona Administrative Procedure Act:  
[A.R.S. Title 41, Chapter 6](#)
- [Arizona Administrative Code](#)
- [Arizona Administrative Register](#)
- [Governor's Regulatory Review Council](#)

<sup>12</sup> [A.R.S. § 41-1056](#)

<sup>13</sup> [A.R.S. § 41-1091](#)

<sup>14</sup> [A.R.S. § 41-1013](#)

<sup>15</sup> [A.R.S. § 41-1091.01](#)

<sup>16</sup> [A.R.S. § 41-1033](#)